Public Prosecutor v Mohd Turmizy bin Mahdzir & Anor

HIGH COURT (IPOH) — CRIMINAL TRIAL NO 45–06 OF 2003
VT SINGHAM J
24 JULY 2007

Criminal Procedure — Sentencing — Factors to be considered — Whether child commtting grave offence entitled to leniency

Criminal Law — Child Act 2001 — Whether accused ought to be tried by court for children — Whether accused rightfully and legally to be tried in High Court

Both the accused were originally charged for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B (2) of the same Act to be read with s 34 of the Penal Code. Both pleaded not guilty to the charge and the case was fixed for hearing. Thereafter, the prosecution tendered an alternative charge, an offence under s.6 of the DDA and punishable under s 39A(2) of the same Act to be read with s 4 of the Penal Code in addition to the original charge. Both the accused claimed trial to the original charge and pleaded guilty to the said alternative charge. As both accused were below 18 years of age at the time of the commission of the offence, the High Court ordered for a probation report in order to assist the court on the appropriate sentence. Counsel for the accused argued that since both accused were below the age of 18 at the time of the commission of the offence, the High Court should consider the sentence as provided under the Child Act 2001 and be given a probation order.

Held, sentencing both accused to 10 years imprisonment and 10 strokes whipping:

(1) It was not in dispute that both the accused were under the age 18 years at the time when the offence was committed and should have been tried by the Court For Children in so far as the alternative charge, being an offence under s 39A(2) of the DDA which they had pleaded guilty. However, s 83(3) of the Act, expressly provides that when the offence is committed by a child but a charge in respect of that offence is made against the child after he has attained the age of 18 years, the charge should be heard by a court other than a Court For Children and that other court may exercise the power mentioned in para 2(a), (b) or (c) of s 83 of the Act (see para 8).

(2) It was also not in dispute that the alternative charge against both the accused who were under the age of 18 years at the time when the offence was committed on 28 November 2002 was framed and tendered to this court on 16 August 2006 after they had attained the age 18 years. Accordingly, both the accused were rightfully and legally tried by this court and not the Court For Children (see para 9).

(3) It could not be overlooked that the punishment to be imposed was solely and exclusively at the discretion of this court and this function could not be usurped by any other body or tribunal. In the instant case, since the accused had already attained the age 18 years at the time when the alternative charge in respect of the offence under s 39A(2) of the DDA was framed and tendered to this court on 16 August 2006, this court is given the discretion to impose the punishment as prescribed in para 2(b) and (c) to s 83 to be read with sub-s (3) and s 91(1)(g) of the Act which provides a sentence of imprisonment if the offence which is committed is punishable with imprisonment (see para 11).

(4) There was no good reason advanced why this court should not impose a custodial sentence as provided under s 39A(2) of the DDA and to be read with s 83(2)(c) and (3) of the Act except for the submission of learned counsel that the accused should not be allowed to mix or associate with adult prisoners. As both the accused had attained the age of 18 years at the time when alternative charge under s 39A(2) of the DDA was framed and tendered in this court on 16 August 2006, which they had pleaded guilty, this court had the discretion as provided under s 83(2)(c) and (3) of the Act to impose a custodial sentence as provided under s 39A(2) of the DDA and considering the nature of the offence and the weight of the dangerous drugs (see para 12).

(5) Children who are sentenced for grave offences by a court other than the Court For Children may be liable to be sentenced 'according to law' rather than in accordance with the provisions in the Act which are normally available in the Court For Children. It is important to stress that child or youth cannot be used as a 'cloak of convenience' in order to shelter from accepting proper responsibility for criminal behaviour. It is important to stress that where young offenders conduct themselves like adults and commit serious or grave crimes, they may attract less leniency in sentencing than their age might otherwise demand (see para 28).

[Bahasa Malaysia summary

Kedua-dua tertuduh pada asalnya telah dituduh untuk kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s 39B(2) Akta yang sama dibaca bersama s 34 Kanun Keseksaan. Kedua-duanya telah mengaku tidak bersalah terhadap pertuduhan tersebut dan kes telah ditetapkan untuk perbicaraan. Berikutan itu, pihak pendakwaan telah menender satu pertuduhan alternatif, satu kesalahan di bawah s 6 ADB dan boleh dihukum di bawah s 39A(2) Akta yang sama dibaca bersama s 4 Kanun Keseksaan selain daripada pertuduhan asal. Kedua-dua tertuduh memohon dibicarakan atas pertuduhan asal dan mengaku bersalah kepada pertuduhan alternatif. Oleh kerana kedua-dua tertuduh di bawah 18 tahun pada masa perlakuan kesalahan itu, Mahkamah Tinggi memerintahkan satu laporan tempoh percubaan bagi tujuan membantu mahkamah menjatuhkan hukuman yang sesuai. Peguam bagi pihak tertuduh berhujah bahawa memandangkan kedua-dua tertuduh di bawah umur 18 tahun pada masa kesalahan dilakukan, Mahkamah Tinggi sepatutnya mengambilkira

hukuman seperti yang diperuntukkan di bawah Akta Kanak-Kanak 2001 dan diberikan satu laporan tempoh percubaan. A

Diputuskan, menjatuhkan hukuman 10 tahun penjara dan 10 kali sebat ke atas kedua-dua tertuduh: B

(1) Tidak dipertikaikan bahawa kedua-dua tertuduh di bawah umur 18 tahun semasa kesalahan dilakukan dan sepatutnya dibicarakan oleh Mahkamah untuk Kanak-Kanak berdasarkan pertuduhan alternatif, yang merupakan satu kesalahan di bawah s 39A(2) ADB yang mana mereka telah membuat pengakuan bersalah. Namun, s 83(3) Akta tersebut, secara nyata memperuntukkan bahawa apabila kesalahan dilakukan oleh seorang kanak-kanak tetapi pertuduhan berkaitan kesalahan itu dibuat terhadap kanak-kanak itu selepas beliau berumur 18 tahun, maka pertuduhan tersebut patut didengar oleh mahkamah selain daripada Mahkamah untuk Kanak-Kanak dan mahkamah lain itu boleh menggunakan kuasa yang disebut dalam perenggan 2(a), (b) atau (c) kepada s 83 Akta tersebut (lihat perenggan 8). C D

(2) Ia juga tidak dipertikaikan bahawa pertuduhan alternatif terhadap kedua-dua tertuduh yang di bawah umur 18 tahun pada masa kesalahan dilakukan pada 28 November 2002 telah dibuat dan ditender ke mahkamah ini pada 16 Ogos 2006 setelah mereka mencapai umur 18 tahun. Sewajarnya, kedua-dua tertuduh telah didengar dengan sah dan mengikut undang-undang oleh mahkamah ini dan bukan Mahkamah Kanak-Kanak (lihat perenggan 9). E

(3) Tidak boleh terlepas perhatian bahawa hukuman yang dikenakan adalah atas budi bicara mutlak dan eksklusif mahkamah ini dan fungsi ini tidak boleh dirampas oleh mana-mana badan atau tribunal lain. Dalam kes semasa, memandangkan tertuduh telahpun mencapai umur 18 tahun pada masa pertuduhan alternatif berkaitan kesalahan di bawah s 39A(2) ADB dibuat dan ditenderkan ke mahkamah ini pada 16 Ogos 2006, mahkamah ini diberikan budi bicara untuk mengenakan hukuman yang ditetapkan dalam perenggan 2(b) dan (c) kepada s 83 dibaca bersama sub-s (3) dan s 91(1)(g) Akta tersebut yang memperuntukkan satu hukuman penjara jika kesalahan yang dilakukan boleh dihukum dengan pemenjaraan (lihat perenggan 11). F G

(4) Tiada alasan baik yang dikemukakan kenapa mahkamah ini tidak patut mengenakan hukuman tahanan seperti diperuntukkan di bawah s 39A(2) ADB dan dibaca bersama s 83(2)(c) dan (3) Akta tersebut kecuali penghujahan peguam bijaksana bahawa tertuduh tidak patut dibenarkan bergaul atau bercampur dengan banduan dewasa. Oleh kerana kedua-dua tertuduh telah mencapai umur 18 tahun pada masa pertuduhan alternatif di bawah s 39A(2) ADB dibuat dan ditender di mahkamah ini pada 16 Ogos 2006, yang mana mereka telah mengaku bersalah, mahkamah ini mempunyai budi bicara seperti diperuntukkan di bawah s 83(2)(c) dan (3) Akta tersebut untuk mengenakan hukuman tahanan seperti diperuntukkan di bawah s 39A(2) ADB dan mengambilkira sifat kesalahan dan berat dadah berbahaya itu (lihat perenggan 12). H I

(5) Kanak-kanak yang dihukum kerana kesalahan berat oleh mahkamah selain daripada Mahkamah untuk Kanak-Kanak boleh dihukum 'menurut undang-undang' dan bukan menurut peruntukan dalam Akta yang sedia ada di Mahkamah untuk Kanak-Kanak. Adalah penting ditekankan bahawa kanak-kanak atau remaja tidak boleh digunakan sebagai satu 'cloak of convenience' bagi tujuan melindungi daripada menerima tanggungjawab sebenar perlakuan jenayah. Adalah penting ditekankan bahawa pesalah muda yang berkelakuan dewasa dan yang melakukan jenayah serius atau berat, mungkin mengundang hukuman yang tidak kurang beratnya daripada umur mereka patut terima (lihat perenggan 28).]

Notes

For a case on factors to be considered in sentencing, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4246.

Cases referred to

Cameron v The Queen 2002, 209 CLR 339 (refd)
Chandra Sekaran a/l Ramiyah & Anor v Public Prosecutor [2000] 3 MLJ 649 (refd)
Channon v The Queen [1978] 33 FRL 433 (refd)
Govindnan a/l Chindnair [1998] 2 MLJ 181 (refd)
KWK (a child) v PP [2003] 4 MLJ 479 (refd)
Lee Say & Ors v PP [1988] 2 CLJ 1555 (refd)
MA (Thanh) [1999] 107 A Crim R 252 (refd)
Mastronardi (2000) 11 A Crim R 306 (refd)
Mogan a/l Marimuthu v PP [2002] 2 AMR 2495 (refd)
Nichloss (1991) 57 A Crim R 391 (refd)
Ong Lai Kim v PP [1991] 3 MLJ 111 (refd)
PP v Dorai Gunaraju Krishna [1993)] 3 CLJ 664 (refd)
PP v Lau Kian Boon & Ors [2006] 6 ML J 254 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Low Kian Boon & Ors [2006] 6 MLJ 254 (refd)
PP v Samundee Devan a/l Muthu Krishnan [2006] 4 MLJ 777 (refd)
R v Ball and R v Sargeant (1974) 60 Cr App R 74 (refd)
R v Nevison Attorney-General's Reference No 2 of 1994) (1995) Crim LR 255 (refd)
R v Radich (1954) NZLR 86 (refd)
R v Rushby [1977] 1 NSWLR 594 (refd)
R v Scarley (2001) 1 Cr App R(S) 86, (refd)
R v Taziker (Attorney-General Reference No 36 of 1994) (1995) Crim LR 256 (refd)
R v Wong, R v Leung [1999] 48 NSWLR 340, 108 A Crim. R 531 (refd)
Raja Izzuddin Shah v PP [1979] 1 MLJ 270 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)
Tan Bok Yeng v PP [1972] 1 MLJ 214 (refd)
Tran Hoai Vinh (1999) NSWCCA 109 (12 May 1999) (refd)
Veerian T Latchmanen v PP [2001] 7 CLJ 466 (refd)
Zaidon Shariff v PP [1996] 4 CLJ 441 (refd)

Legislation referred to

Child Act 2001 ss 2(1)(d), 11(5), 83(2)(c), (3), 91(1)(g), (h), 96(b), 97(1)
Criminal Procedure Code s 2

Dangerous Drugs Act 1952 ss 6, 39A(2), 39B(1)(a), 39B(2)(f)
Penal Code ss 34, 82, 316, 325

Siti Badariah bte Mohd Yusof (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Manjeet Kaur (Naran Singh & Co) for the accuseds.

VT Singham J::

[1] On 4 November 2003, the accuseds were originally charged for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B(2) of the same Act to be read with s 34 of the Penal Code. Both the accuseds pleaded not guilty to the charge and the case was fixed for hearing.

[2] On 16 August 2006, the prosecution tendered an alternative charge,an offence under s 6 of the DDA and punishable under s 39A(2) of the same Act to be read with s 34 of the Penal Code in addition to the original charge.

The alternative charge reads as follows:

> Bahawa kamu bersama-sama pada 28 November 2001, jam lebih kurang 5.55 pagi di rumah No 2, Jalan Maju Setia 1, Taman Maju, Tronoh, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah ada dalam milikan kamu dadah berbahaya, iaitu Cannabis seberat 419.4g dan oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 (Akta 234) yang boleh dihukum di bawah s 39A(2) Akta yang sama dan dibaca bersama s 34 Kanun Keseksaan.

[3] On the same day on 16 August 2006, both the accuseds claimed trial to the original charge and pleaded guilty to the said alternative charge. As both accuseds were below 18 years of age at the time of the commission of the offence, on 28 November 2001, this court ordered for a probation report in order to assist the court on the appropriate sentence. The date for the sentence was then postponed pending the probation report. The sentence provided by law under s 39A(2) of the Dangerous Drugs Act 1952 is as follows:

> Section 39A(2) reads:
>
> > Every person found guilty of an offence against this act where the offence is not punishable with death and *where the subject matter of the offence is:*
> >
> > (f) *50 grammes or more in weight of cannabis* shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, *be punished with imprisonment for life or for an term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes.* (Emphasis added.)

[4] On 13 November 2006, the Social Welfare Officer tendered two separate probation reports on both the accuseds which was marked as encl 26 for the first accused and the encl 27 for the second accused.

[5] On the sentence, learned counsel for both the accuseds, inter alia, submitted briefly as follows:

(1) As both the accuseds were below 18 years at the time of the commission of the offence on 28 November 2002, the first accused, being 17 years 2 months and 8 days (presently 22 years 2 months and 20 days as on 13 November 2006) and the second accused, being 17 years 4 months and 14 days and (presently 22 years 4 months and 1 day as on 13 November 2006), this court should consider the sentence as provided under the Child Act 2001 ('the Act') and be given a probation order.

(2) As the prosecution had delayed framing of the alternative charge under s 6 of the DDA until after the accuseds had attained the age of 18 years, the accused had been denied the opportunity of being tried by the Court For Children and the probation order as provided under the Act.

(3) As the offence of possession of the dangerous drug as per the charge is not a 'grave crime' as defined in s 2(1)(d) of the Act, both the accuseds should be ordered to be placed under probation and urged upon this court not to impose a custodial sentence.

(4) Sentencing the accuseds to imprisonment will defeat the aim of rehabilitation as they will mix and associate themselves with other adult prisoners.

(5) On the other hand, if this court is not minded to impose the sentence as provided under the Act, namely, the probation order, this court should order the whipping as provided under s 91(1)(g) of the Act.

(6) On the other hand, learned DPP for the prosecution submitted as follows:

(i) the original charge against the accuseds was for an offence under s 39(B) of the DDA and the punishment upon conviction is death where the Court For Children has no jurisdiction.

(ii) the offence under s 39A(2) of the DDA is a grave crime and the court cannot consider a probation order as the punishment provided is imprisonment for life or for a term which shall not be less than five years, and shall also be punishable with whipping of not less than ten strokes.

(iii) Urged upon this court to apply the sentence as provided under the DDA, namely, sub-s 2 of s 39A of the DDA.

(iv) However, the whipping to be imposed can be considered under the Act.

(v) Even, if this court were to impose a custodial sentence, the court could still apply the sentencing provisions as provided under the Act as one of the sentence provided under s 91(1)(h) of the Act which is also punishable with imprisonment.

(vi) Therefore, probation order is not suitable for the nature of the offence committed by the accuseds.

DECISION

[6] Before this court proceeds to consider the appropriate sentence, it is important to consider and critically examine some of the relevant provisions of the Act.

The relevant provisions of the Act for the purpose of this case is reproduced and are as follows:

Interpretation:

s 2(1) In this Act, unless the context otherwise requires —

'*grave crime*' includes:

(a) the offences of murder, culpable homicide not amounting to murder or attempted murder;

(b) all offences under the Firearms (Increased Penalties) Act 1971 [Act 37];

(c) all offence under the Internal Security Act 1960 [Act 82] punishable with imprisonment for life or with death;

(d) all offences under the Dangerous Drug Act 1952 [Act 234] punishable with imprisonment for more than five years or with death and

(e) all offences under the Kidnapping Act 1961 [Act 365];

'*child*' —

(a) means a person under the age of eighteen years; and

(b) in relation to criminal proceedings, mean a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code [Act 574].

S.76 Notwithstanding anything in this Act, the High Court, a Sessions Court and a Magistrate's Court shall have the power to order the detention, in a Henry Gurney School, up to but not after he has attained the age of twenty-one years, of any person who has attained the age of eighteen years but has not attained the age of twenty-one years at the date of making such order.

S.83 (1) Notwithstanding anything contained in any written law relating to the arrest, detention and trial of persons committing any offence but subject to subsections (3) and (4), a child who is alleged to have committed an offence shall not be arrested, detained or tried except in accordance with this Act.

(2) When a child is charge with an offence before a Court For Children and during the pendency of the case he attains the age of eighteen years the Court For Children shall, notwithstanding any provisions of the Act, continue to hear the charge against the child and may:

(a) exercise the power under section 76;

(b) exercise the power under paragraph 91(1)(a), (b), (c), (d) or (g); or

(c) if the offence is punishable with imprisonment, impose any term of imprisonment which could be awarded by Sessions Court.

(3) When an offence is committed by a child but a charge in respect of that offence is made against the child after he has attained the age of eighteen years, the charge shall be heard by a Court other than a Court For Children and that other Court may exercise the power mentioned in paragraph (2)(a),(b) and (c).

S.91(l) If a Court For Children is satisfied that an offence has been proved the Court shall, in addition to any other powers exercise able by virtue of this Act, have power to:

(a) admonish and discharge the child;

(b) discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court;

(c) order the child to be placed in the care of a relative or other fit and proper person:

(i) for such period to be specified by the Court; and

(ii) with such conditions as may be imposed by the Court.

(d) order the child to pay a fine, compensation or costs;

(e) make a probation order under section 98;

(f) order the child to be sent to an approved school or a Henry Gurney School;

(g) *order the child, if a male, to be whipped with not more than ten strokes* of a light cane;

(i) within the Court premises; and

(ii) in the presence, if he desires to be present, of the parent or guardian of the child.

(h) *impose on the child, if he aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2) any term of imprisonment which could be awarded by a Sessions Court.*

S 97(1) A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that *at the time when the offence was committed he was a child.*

(Emphasis added.)

[7] At the outset, this court wishes to state that under s 97(1) of the Act, a child shall not be sentenced to death and that in any event, both the accused were still children at the time when the original charge (encl 6) was framed and tendered to this court. Therefore, the contention of the learned DPP that the punishment for the original offence under s 39(B) of the DDA is death has no relevance to the instant case as the accuseds were children at the time when the offence was alleged to have been committed (see s 97(1) of the Act).

[8] In the instant case, as stated above it is not in dispute that both the accuseds were under the age 18 years at the time when the offence was committed and should have been tried by the Court For Children in so far as the alternative charge, being an offence under s 39A(2) of the DDA which they have pleaded guilty. However, s 83(3) of the Act, expressly provides that when the offence is committed by a child but a charge in respect of that offence is made against the child after he has attained the age of 18 years, the charge should be heard by a court other than a Court For Children and that other Court may exercise the power mentioned in para 2(a), (b) or (c) of s 83 of the Act.

[9] It is also not in dispute that the alternative charge (encl 6A) against both the accuseds who were under the age of 18 years at the time when the offence was committed on 28 November 2002 was framed and tendered to this court on 16 August 2006 after they had attained the age 18 years. Accordingly, both the accuseds are rightfully and legally tried by this court and not the Court For Children.

[10] This court is mindful that the object, intention and spirit of the legislature in introducing the Act is for a person who has attained the age of criminal responsibility as prescribed in s 82 of the Penal Code and is under the age of 18 years to be tried by Court For Children and the same should not be frustrated. However, as stated above, s 83(3) of the Act provides the power for this court on the facts and circumstances in the instant case to try both the accuseds.

[11] Be that as it may, it cannot be overlooked that the punishment to be imposed is solely and exclusively at the discretion of this court and this function cannot be usurped by any other body or tribunal. In the instant case, since the accuseds have already attained the age 18 years at the time when the alternative charge in respect of the offence under s 39A(2) of the DDA was framed and tendered to this court on 16 August 2006, this court is given the discretion to impose the punishment as prescribed in para 2(b) and (c) to s 83 to be read with sub s (3) and s.91(1)(g) of the Act which provides a sentence of imprisonment if the offence which is committed is punishable with imprisonment. In the instant case, every person who is found guilty of possession of 50g or more in weight of cannabis, shall be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes (see 39A(2)(f) of the DDA).

[12] In the instant case, there is no good reason advanced why this court should not impose a custodial sentence as provided under s 39A(2) of the DDA and to be read with s 83(2)(c) and (3) of the Act except for the submission of learned counsel that the accuseds should not be allowed to mix or associate with adult prisoners. As both the accused have attained the age of 18 years at the time when alternative charge under s 39A(2) of the DDA was framed and tendered in this court on 16 August 2006, which they had pleaded guilty, this court has the discretion as provided under s 83(2)(c) and (3) of the Act to impose a custodial sentence as provided under s 39A(2) of the DDA and considering the nature of the offence and the weight of the dangerous drugs.

[13] In *Chandra Sekaran a/l Ramiyah & Anor v Public Prosecutor* [2000] 3 MLJ 649, his Lordship Haidar JCA (as he then was) said (at p 651):

> We do appreciate that it is the duty of the counsel in mitigating for the accused in respect of sentencing to urge the court to consider the interests of the accused. Though the judge must consider the interests of the accused he had nevertheless to consider the interests of the public as well. In other words he has 'to strike a balance, as far as possible, between the interests of the public and the interests of the accused' per Hashim Yeop Sani (as he then was) in *PP v Loo Choon Fatt* [1976] 2 MLJ 256 at p 258B.

[14] On the facts and considering the nature of the offence and the weight of the dangerous drugs, being 419.4g, public interest, the rampancy of the particular nature of the offence, especially involving children and youths and after taking into consideration the welfare reports and the mitigating circumstances and the submission of the learned DPP, this court finds that the probation order as submitted

by learned counsel is not an appropriate punishment. Justice of the case demands that the accuseds be given custodial sentence and the sentence as provided under s 39A(2) of the DDA (see *Mogan a/l Marimuthu* [2002)] 2 AMR 2495 at p 2059; a decision of this court).

[15] On the other hand, having had taken into consideration the welfare reports, the facts as presented on behalf of the prosecution, the accuseds being first offenders and were children at the time when they committed the offence, their plea of guilty, this court is of the view that it is not appropriate in the circumstances of the instant case to impose the punishment of life imprisonment. However, this court finds that a probation order is also not a suitable and appropriate punishment as it will be against public interest and will not reflect the seriousness of the offence and may convey the wrong message to would be offenders who are children or youths. This court finds that on the facts and for the reasons stated above and after having considered the mitigation pleas separately and individually against the accuseds, a custodial sentence is most appropriate (see *Veerian T Latchmanen v PP* [2001] 7 CLJ 466, a decision of this court) (see also *KWK (a child) v PP* [2003] 4 MLJ 479 at pp 490–493 which although is a case in a reference to an application for stay pending appeal, but however, the observation made by the Court of Appeal and the treatment that was accorded to the applicant/child is relevant).

[16] This court has also considered the complaint of learned counsel for the accuseds that the accuseds have been denied the opportunity to be tried by the Court For Children and there is a possibility of a probation order if the prosecution had tendered the alternative charge much earlier before the accused had attained the age of 18 years. As to this complaint, this court is of the considered view that complaint has been taken out of context when considering the facts and circumstances of the case. First, the alternative charge was framed and tendered by the prosecution after the learned counsel for the accused had made representations to the Honourable Attorney General Malaysia to reconsider the original charge where representations were made only after the accused who were children at the time when the offence was committed had attainted the age of 18 years and secondly, a child who is charged with an offence before a Court For Children and during the pendency of the case he attains the age of eighteen years, the Court For Children shall, notwithstanding any provisions of this Act, continue to hear the charge against the Child and may under sub-s 2(c) of s 83 of the Act impose any term of imprisonment which could be awarded by a sessions court as in the instant case.

[17] This court, with respect, is unable to agree with the submission of learned counsel for the accuseds that the offence committed by the accuseds under s 6 and punishable under s 39A(2) of the DDA is not a 'grave crime' as defined under s 2(1) of the Act. The contention of learned counsel for the accuseds that since the punishment as provided under s 39A(2) of the DDA prescribes the minimum term of imprisonment as five years whereas s. 2(1)(d) of the Act provides and define 'grave crime' of all offences under the DDA punishable with imprisonment for more than five years, the offence which the accuseds have been found guilty and convicted is not a 'grave crime' as defined by the Act is misplaced. Section 39A(2) of the DDA

expressly provides the punishment inter alia with imprisonment for life or for a term which shall not be less than five years. In the other words, the law provides for the punishment for the said offence with imprisonment for more than five years ie with imprisonment for life but gives the discretion to the court to either imposes punishment for life or for a term which shall not be less than five years. Accordingly, a purposive interpretation must be given to both the provision under s 2(1)(d) of the Act to be read with s 39A(2) of the DDA. Therefore, the contention of learned counsel for the accuseds that the offence under s 6 of the DDA which is punishable under s 39A(2) of the DDA as per charge is not a 'grave crime' as defined in s 2(1)(d) of the Act cannot be accepted as the correct proposition in law and ought to be rejected when considering punishment to be imposed in the instant case.

[18] As to the fear that the accuseds may mix or associate with adult prisoners, s 96(b) of the Act expressly provides that a child aged fourteen or above shall not, if ordered to be imprisoned, be allowed to associate with adult prisoners. In any event, in the instant case, both the accuseds are now adults, ie at the time of passing the sentence. It is entirely up to them to have an independent mind of their own if they want to stay clear and clean of any criminal activities in the future and to ensure that they are not easily influenced by other prisoners even if they are kept together to serve the sentence in the same prison or place as the other adult prisoners who were adults at the time when they committed the offence for which they have been sentenced to imprisonment. On the other hand, this court is mindful that the courts naturally start the observation and recognises that contact between children and adult prisoners is most undesirable but this factor alone cannot be allowed to prevail or override the gravity of the offence which the accused had been found guilty, public interest and prevalence of crimes which are committed by children (see *Veerian T Latchmanen v PP* [2001] 7 CLJ 466; a decision by this court). However, this observation is subject to facts and circumstances of each individual case.

[19] The deleterious effects of dangerous drugs found in the possession of children and youth requires no elaboration as first, it is a crime which affects public health and public safety, secondly, it can indeed be the spawn of crimes that may ultimately result in violence or other crimes and no doubt have a shattering effect on public tranquillity and society generally. The message must be made clear that not all first offenders and youth who have pleaded guilty to the offence and appeal to this court for non custodial sentence will be shown mercy and leniency and granted as a matter of course, as each case will be dependant on its own set of facts and mitigating circumstances. The prevalence in the criminal scene presently and public safety must also be considered as the administration of justice is undeniably a matter of public interest. Therefore, it is legitimate for the public to expect the courts to impose severe sentence to those and including children who commit serious or grave crime which affects public heath and safety, so as to commensurate with the nature of the crime and as a deterrence.

[20] In the instant case, the offence of possession of dangerous drugs, namely cannabis to wit 419.4g cannot be treaty lightly as the punishment provided by law pursuant to s 39A(2) of the DDA itself shows the seriousness of the offence and this

court must give effect to the object and intention of the legislative in introducing the enhanced punishment by an amendment (see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256. His Lordship Hashim Yeop A Sani (as he then was) said:

> The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed... (see *Public Prosecutor v. Low Kian Boon & Ors* [2006] 6 MLJ 254; *Khirul Ihsan Hussain v PP* [1999)] 8 CLJ 309; *PP v Baharuddin Mustaffa* [2005] 8 CLJ 445).

[21] It is generally accepted that the purpose of deterrent punishment is to deter others as well as to deter that particular criminal, in this case the accuseds from committing crime again (see *R v Ball and R v Sargeant* (1974) 60 Cr App R 74). In *R v Radich* (1954) NZLR 86 at p 87, Fair J said:

> ... one of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilized countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commissions of many that would have been committed if it was thought that the offender could escape without punishment or with only a light punishment, If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine that appropriate amount of punishment.

[22] A very close and critical examination of the Act by this court discloses that the right of a child who is under the age of 18 years and who has attained the age of criminal responsibility as prescribed by s 82 of the Penal Code ie above 10 years of age to have the charges tried against him in the Court For Children, subject to s 11(5) of the Act, is one, not a mere matter of procedure but of statutory right and mandatory and no course of decision can override the statute. However, this court wish to reiterate that s 83(3) of the Act provides that when the offence is committed by a child but charge is respect of that offence is made against the child after the child has attained the age of 18 years, the charge shall be heard by a court other then a Court For Children, in the instant case, the High Court. The reformative theory, especially for children is certainly important but too much stress or emphasis cannot be laid on it to such an extent the tenets of punishment provided by law is altogether vanished. In *Public Prosecutor v Low Kian Boon & Ors* [2006] 6 MLJ 254, his Lordship KN Segara J at p 295 said:

> Serious crimes committed by youth seems to be on the rise and wrong signals would be sent to youths and the public at large into believing that the courts would be ever so indulgent

to treat them with kid gloves, should they ever be convicted of such crimes, if deterrent sentences are not meted out to impress upon these youths and like-minded offenders that crime does not pay.

In *Tan Bok Yeng v Public Prosecutor* [1972] 1 MLJ 214 at p 215 Sharma J said:

I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly, ornamental and an orthodox instrument of justice, ineffective in its result and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of the punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.

[23] Generally, a plea of guilty is taken into account when imposing sentence and significant reference is made to that consideration in the sentencing process. The courts have said that no plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution (see *Raja Izzuddin Shah v PP* [1979] 1 MLJ 270; *PP v Dorai Gunaraju Krishna* [1993)] 3 CLJ 664 at p 666 and *Sau Soo Kim v PP* [1975] 2 MLJ 134 at p 137 and *Public Prosecutor v Samundee Devan a/l Muthu Krishnan* [2006] 4 MLJ 777). In *MA (Thanh)* [1999] 107 A Crim R 252 where it was said:

The function of the criminal law and purpose of punishment cannot be found in any single explanation, for it depends both upon the nature and type of the single heading of the protection of society, the protection of the community from the crime. However, a plea of guilty is always a matter for the court to take into account when imposing sentence and significant reference should explicitly be made to that consideration in the sentencing process, (*R v Cuthbert* [1967] 86 WN (Pt 1) (NSW) 272).

[24] In *Channon v The Queen* [1978] 33 FRL 433 at p 451 Deane J said:

In every case, there is but one ultimate question involved in the determination of sentence. That question is what Is the appropriate punishment for the particular offence in the relevant circumstances.

[25] This consideration of the plea of guilty is taken into account because it is usually indication of some remorse, acceptance of responsibility and willingness on the part of the offender to facilitate the course of justice (see *Cameron v The Queen* 2002, 209 CLR 339). However, the degree of leniency to be afforded on that consideration will depend upon many different factors. In some cases, a plea of guilty will not lead to any leniency or discount. The prevalence of drug offenders is a relevant factor that may be taken into consideration on the general deterrence so as to reflect both the seriousness of the offence and its prevalence. An offender who has pleaded guilty is entitled not as of right to such significant weight to justify a sentence which will have to commensurate to the plead of guilty. Nevertheless, in the instant case, the amount of the dangerous drug involved in the offence is also an important

consideration in the sentencing exercise, particularly; the adverse effects of dangerous drugs on the community are related to the quantity available (see *R v Wong, R v Leung* [1999] 48 NSWLR 340, 108 A Crim. R 531).

[26] It is well recognized that generally and for good reason a plea of guilty results in a lesser sentence but that rule is not absolute or automatic (see *Lee Say & Ors v PP* [1988] 2 CLJ 1555; *Zaidon Shariff v PP* [1996] 4 CLJ 441 at p 446; *Govindnan a/l Chindnair* [1998] 2 MLJ 181 at p 192; *Mogan a/l Marimuthu v PP* [2002] 2 AMR 2495 at p 2509; *R v Nevison Attorney-General's Reference No 2 of 1994)* (1995) Crim LR 255). In *R v Scarley* (2001) 1 Cr App R(S) 86, Court of Appeal (Criminal Division), it was submitted that the appellant was not given any credit for his guilty plea. In dismissing the appeal, Penry-Davey J said:

> In the case of *Reay* (1993)RTR 189, 13 Cr App Rep (S)533 Jowitt J giving the judgment of the court said this at p 192 of the former report:
>
> > First and foremost, although the court in most cases will give credit for a plea of guilty, the public interest dictates that this is not to be seen as an inflexible rule. There are cases in which, despite the plea of guilty, an offence is of such seriousness...that the public interest requires the imposition of the maximum sentence. If ever there was such a case, this is it. This point alone is sufficient to dispose of the appeal. Other exceptions to the general rule of credit for plea of guilty were identified in the case of *Costen* (1989) 11 Cr App R(S)182, including those cases where the protection of the public makes it necessary that a long sentence, possibly the maximum, should be passed or in the case of a last minute tactical plea of guilty...
>
> The appeal is accordingly dismissed.

[27] A plea that a custodial sentence would serve no useful purpose where the offender is of good character and has suffered extreme distress as the result of the offence, ignores the deterrent effect of a custodial sentence (see *R v Taziker (Attorney-General Reference No 36 of 1994)* (1995) Crim LR 256.

[28] This court is of the view that children who are sentenced for grave offences by a court other than the Court For Children may be liable to be sentenced 'according to law' rather than in accordance with the provisions in the Act which are normally available in the Court For Children. It is important to stress that child or youth cannot be used as a 'cloak of convenience' in order to shelter from accepting proper responsibility for criminal behaviour (see *Mastronardi* (2000) 11 A Crim R 306). It is important to stress that where young offenders conduct themselves like adults and commit serious or grave crimes; they may attract less leniency in sentencing than their age might otherwise demand (see *Tan Bok Yeng v PP* [1972] 1 MLJ 214; *PP v Lau Kian Boon & Ors* [2006] 6 ML J 254 at p 295; *Tran Hoai Vinh* (1999) NSWCCA 109 (12 May 1999); *Nichloss* (1991) 57 A Crim R 391).

Be that as it may, in considering and exercising its discretion in passing an appropriate sentence, this court has taken into consideration the following factors:

(1) the plea of guilty by the accused on the first reasonable opportunity available when the alternative charge under s 6 of the DDA was framed and tendered to this court which merits due weight and consideration;

(2) the age of the accuseds, at the time when the commission of the offence was committed;

(3) that they had no record of any previous conviction;

(4) that both the accuseds had been under remand since the date of his arrest on 28 November 2001;

(5) the plea of guilty has saved much judicial time of a lengthy trial and expenses.

(6) the related offence is presently rampant and serious and that public interest demands for a deterrent sentence.

In *R v Rushby* [1977] 1 NSWLR 594, Street CJ said at p 597:

> The judicial discretion underlying the formulation of a sentence must be exercised with due regard to principles of law deducible from authoritative decisions. The philosophy of the Common Law requires adherence to established doctrines and principles that have over years, and in multiple instances, been found to be best calculated to serve the ends of justice. The adjudicative process, if it is to be consistent and ordered, must observe and apply these doctrines and principles and thus must necessarily be attended by a requisite disengagement and detachment. It is cool reason, not passion or generosity that must characterize sentencing, as all other acts of judgment. Although the discretion left to the judge is wide, the doctrines and principles established by the Common Law in regard to sentencing provide the chart that both relieves the judge from too close a personal involvement with the case in hand, and promotes consistency of approach on the part of individual judges.

[29] As to the whipping which is mandatory under s 39A(2) of the DDA, it may be of some relevance to refer to the case of *Ong Lai Kim v Public Prosecutor* [1991] 3 MLJ 111. In that case, the learned presiding judge of the sessions court had imposed whipping being 10 strokes of light rotan against the first appellant on the believe that the first appellant was a youthful offender as defined under s 2 of the Criminal Procedure Code ('CPC') where in fact he was 17 years 11 months at the time the offence was committed. Section.2 of the CPC has defined a 'youthful offender' as a child convicted of an offence punishable by fine or imprisonment whose age is above 10 and under the age of 16 years. However, the learned DPP being dissatisfied with the order of light rotan had applied to the High Court to exercise its power of revision under s 325 read with s 316 of the Penal Code to alter the nature of whipping to that of whipping for adults. On revision, Zakaria Yatim J (as he then was) ordered the order of light rotan to be substituted with whipping inflicted against adult offender as it was found that the first appellant was not a youthful offender as defined under s 2 of the CPC as he was 17 years 11 months although the learned counsel for the first appellant had submitted that there was insufficient evidence to show that the appellant was 17 years 11 months.

[30] On the facts and circumstances, in the instant case, the first accused is sentenced to 10 year's imprisonment with effect from the date of his arrest on 28 November 2001 and ordered to be whipped with ten strokes and to be carried out in accordance with s 91(1)(g) of the Act. The second accused is also sentenced

A 10 year's imprisonment with effect from the date of his arrest on 28 November 2001 and ordered to be whipped with ten strokes as provided under s 91(1)(g) of the Act.

Both accused sentenced to 10 years imprisonment and 10 strokes whipping.

B Reported by Brendan Navin Siva

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